Jamir Hassan v Kang Min

HIGH COURT (KUCHING) — SUIT NO KG 100 OF 1990
HAIDAR J
17 MAY 1991

Civil Procedure *— Pleadings — Statement of claim — Striking out — Time limit for application — Powers of court — Matters to be considered — Whether history of case relevant — Rules of the High Court 1980 O 18 r 19 & O 92 r 4*

Land Law *— Adverse possession — Whether applicable under Torrens system of land registration — Whether defeats claim of registered proprietor of land — Land Code (Cap 81) (Sarawak) s 131*

Limitation *— Land — Adverse possession — Whether may be claimed against registered proprietor of land — Limitation Ordinance (Cap 49) (Sarawak) s 26*

The plaintiff commenced an action by writ of summons seeking a declaration, inter alia, that he was entitled to be registered as the proprietor of a certain land. The plaintiff had lodged a caveat in respect of the land and claimed adverse possession apparently on the ground that the right of the registered proprietor had extinguished by virtue of s 26 of the Limitation Ordinance (Cap 49) of Sarawak read with item 112 of the schedule to the Ordinance. The defendant was the executrix of the estate of the registered proprietor. The defendant applied for an order under O 18 r 19 of the Rules of the High Court 1980 that the writ of summons and statement of claim be struck out on the grounds that the statement of claim disclosed no reasonable cause of action, was frivolous and vexatious and was otherwise an abuse of the process of the court. The plaintiff relied on the statute of limitation to back his claim of adverse possession. There had been earlier proceedings in which it had been alleged by the plaintiff that the registered proprietor had obtained title to the land by fraud. It was contended for the plaintiff that the defendant's application should be dismissed on the ground of delay in making the application.

Held, allowing the defendant's application:

(1) An application to strike out a pleading should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial.

(2) The exclusion of the application of the doctrine of adverse possession in the Torrens system is based on the notion that such doctrine would conflict with the fundamental principle of the Torrens system — the indefeasible register. The basic object of the Torrens system, it would appear, is to facilitate proof of ownership by certifying title in a written instrument and therefore the principle of allowing ownership to be proved by evidence of physical occupation should be rejected.

(3) Section 131 of the Land Code of Sarawak protects the 'title' or the 'right' of the registered proprietor; it prevents both the acquisition of a title by adverse possession or user to or in derogation of the title of the registered proprietor holding directly from the government.

(4) The absence of mention of the statute of limitation in s 131 of the Land Code makes no difference as to the protection of the indefeasible title of the registered proprietor in the Torrens system. It would appear that the statute of limitation is applicable only in respect of the acquisition of a possessory title against an unregistered interest.

(5) The court will have to examine the claim and consider whether the claim of the plaintiff is obviously unsustainable. If the law is clear, as it was in this case, it is not a matter of discretion for the court to exercise its powers. It is not right to call upon the defendant to justify a plea which discloses no cause of action. In the circumstances on this ground alone the action should be struck out as disclosing no cause of action and as being prejudicial and embarrassing.

(6) There did not seem to be evidence shown by the plaintiff in the pleadings that he was either in physical possession of the land or exercising dominion over the property.

(7) The court was entitled to look at the history of the case to determine whether the pleadings disclosed a cause of action. In a previous action, the plaintiff had relied on similar grounds as in the present action but for reasons best known to himself had decided to withdraw it. The real cause for complaint appeared to be the alleged fraud rather than adverse possession and it was patently clear that the present action on the ground of adverse possession was an abuse of the process of the court and could be said to be vexatious.

[Bahasa Malaysia summary

Plaintif telah memulakan satu tindakan melalui writ saman meminta satu deklarasi, antara lain, bahawa beliau berhak didaftarkan sebagai tuan punya tanah tertentu. Plaintif telah mengemukakan satu kaveat berkenaan dengan tanah itu dan menuntut pemilikan bertentangan, nampaknya, atas alasan bahawa hak tuan punya berdaftar telah lenyap mengikut s 26 Ordinan Had Masa (Bab 49) Sarawak dibaca bersama butiran 112 dalam jadual Ordinan itu. Defendan adalah wasi harta pusaka tuan punya berdaftar tersebut. Defendan memohon satu perintah di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 bahawa writ saman dan pernyataan tuntutan dibatalkan atas alasan bahawa pernyataan tuntutan itu tidak mendedahkan kausa tindakan yang munasabah, adalah remeh dan menyusahkan dan kalau tidak adalah satu penyalahgunaan proses mahkamah. Plaintif bergantung pada statut had masa untuk menyokong tuntutan pemilikan bertentangan beliau. Terdapat prosiding yang lebih awal dalam mana plaintif telah mengatakan bahawa tuan punya berdaftar telah mendapat

hakmilik kepada tanah tersebut melalui fraud. Telah dihujahkan bagi pihak plaintif bahawa permohonan defendan harus ditolak atas alasan kelengahan dalam membuat permohonan itu. A

Diputuskan, membenarkan permohonan defendan itu:

(1) Suatu permohonan untuk membatalkan sesuatu pliding harus dibuat dengan segera dan biasanya sebelum pliding ditutup. Mahkamah, akan tetapi, boleh membenarkan suatu permohonan dibuat selepas pliding ditutup. Tetapi suatu permohonan seperti itu mesti ditolak selepas tindakan itu telah ditetapkan untuk perbicaraan. B

(2) Doktrin pemilikan bertentangan tidak terpakai dalam sistem Torrens berdasarkan tanggapan bahawa doktrin tersebut akan bercanggah dengan prinsip asasi sistem Torrens — daftar yang tak boleh disangkal. Matlamat asas sistem Torrens, nampaknya, ialah untuk memudahkan pembuktian keempunyaan dengan memperakui hakmilik dalam suatu suratcara bertulis dan oleh kerana itu prinsip membenarkan keempunyaan dibuktikan dengan keterangan penghunian fizikal harus ditolak. C D

(3) Seksyen 131 Kanun Tanah Sarawak melindungi hakmilik atau hak tuan punya berdaftar dan mencegah kedua-dua perolehan hakmilik melalui pemilikan atau penggunaan bertentangan atau pun dalam pengurangan (derogation) hakmilik tuan punya berdaftar yang memegang terus daripada kerajaan. E

(4) Ketiadaan sebutan statut had masa dalam s 131 Kanun Tanah itu tidak membuat apa-apa perbezaan tentang perlindungan hakmilik tuan punya berdaftar yang tak boleh disangkal dalam sistem Torrens. Nampaknya statut had masa terpakai hanya berkenaan dengan perolehan hakmilik pemilikan terhadap kepentingan yang tidak berdaftar. F

(5) Mahkamah akan terpaksa memeriksa tuntutan itu dan mempertimbangkan sama ada tuntutan plaintif itu jelas tidak boleh disokong. Jika undang-undang adalah jelas, sebagaimana yang terjadi dalam kes ini, ia bukanlah satu perkara budi bicara bagi mahkamah menggunakan kuasanya. Tidaklah betul meminta defendan untuk memberikan justifikasi bagi pli yang tidak mendedahkan apa-apa kausa tindakan. Dalam keadaan begitu atas alasan ini sahaja tindakan itu harus dibatalkan kerana tidak mendedahkan apa-apa kausa tindakan dan kerana ia memudaratkan dan memalukan. G

(6) Tidak kelihatan keterangan yang ditunjukkan oleh plaintif dalam pliding beliau bahawa beliau adalah dalam pemilikan fizikal tanah itu atau pun menguasai harta itu. H

(7) Mahkamah berhak melihat sejarah kes itu untuk memutuskan sama ada pliding itu mendedahkan suatu kausa tindakan. Dalam tindakan sebelumnya, plaintif telah bergantung kepada alasan yang serupa dengan alasan dalam tindakan sekarang ini tetapi, kerana sebab-sebab yang diketahuinya dengan lebih baik, telah membuat keputusan untuk menarik balik tindakan itu. Sebab yang sebenar bagi aduan nampaknya adalah fraud yang didakwa I

dan bukan pemilikan bertentangan dan adalah ternyata bahawa tindakan sekarang ini atas alasan pemilikan bertentangan adalah penyalahgunaan proses mahkamah dan boleh dikatakan menyusahkan.]

Cases referred to

1 *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman and another action* [1987] 2 MLJ 633 (folld)
2 *Golden Century Development Sdn Bhd & Anor v Ganhoe & Anor* [1983] 1 MLJ 86 (folld)
3 *Sparks v Meers & Ors* [1971] 2 NSWLR 1 (refd)
4 *Willoughby v Eckstein* [1936] 1 All ER 650 (refd)
5 *Shanghai Hall Ltd v Town House Hotel Ltd* [1967] 1 MLJ 223 (folld)
6 *Re Vernazza* [1959] 2 All ER 200; [1959] 1 WLR 622 (folld)

Legislation referred to

Land Code (Cap 27) (Sarawak) s 30(1)
Land Code (Cap 81) (Sarawak) ss 43, 131, 132, 178
Limitation Ordinance (Cap 49) (Sarawak) s 26
National Land Code 1965 s 341
Rules of the High Court 1980 O 14 r 1, O 18 r 19, O 32 rr 1, 13(6), O 92 r 4
Real Property Act 1900 [NSW] s 45

TO Thomas (*Thomas & Co*) for the plaintiff.
Arthur Lee (*Arthur Lee & Co*) for the defendant.

Cur Adv Vult

Haidar J: The plaintiff filed this action claiming, inter alia:

(1) A declaration that the right and title of Lok Chuan Yew (deceased) to Lots 1456, 1474, 1476, 1477 and 1478, all of Block 10, Kuching Central Land District, have been extinguished.
(2) A declaration that the plaintiff has become entitled to be registered as the proprietor of the six lots of land known as Lots 1456, 1474, 1476, 1477 and 1478, all of Block 10, Kuching Central Land District.

Thereafter the plaintiff filed a notice of motion, for an order that the Caveat No L 4671/1990 registered on 17 April 1990 against all those six parcels of land, namely, Lots 1456, 1474, 1476, 1477 and 1478, all of Block 10 Kuching Central Land District ('the said land') shall not be deemed to have lapsed until after the judgment in the action herein, notwithstanding the receipt on 14 June 1990 of a notice under s 178 of the Land Code (Cap 81) ('the Land Code') by the plaintiff/caveator from the Registrar, Land and Survey Department, Kuching Division, Kuching. It is supported by the affidavit of the plaintiff. The caveatable interest claimed by the plaintiff is on the ground of adverse possession of the said land. I heard the notice of motion on 5 September 1990 and delivered oral judgment on 8 September

1990 dismissing it with costs. There has been no appeal filed in respect of my judgment on the notice of motion.

By consent, the defendant was allowed extension of time to file the defence. Accordingly the defendant filed the statement of defence and counterclaim on 14 September 1990. Instead of filing the defence to the counterclaim of the defendant, the plaintiff filed an application by way of summons-in-chambers on 15 October 1990 (encl 28) praying that the counterclaim be struck out with costs on the grounds that:

(a) it discloses no reasonable cause of action;
(b) it is frivolous and vexatious;
(c) it is otherwise an abuse of the process of the court.

In addition thereto, the plaintiff urged the court to invoke the powers under its inherent jurisdiction, apparently under O 92 r 4 of the Rules of the High Court 1980 ('the RHC'). It is supported by the affidavit of the plaintiff.

On 31 October 1990 the defendant filed an application by way of summons-in-chambers under O 14 r 1 and O 18 r 19 of the RHC (encl 33). It is supported by the affidavit of Kang Min (f), the executrix of the estate of Lok Chuan Yew (deceased).

When both applications came before me for hearing on 31 January 1991 and after hearing both counsel, I directed that I will hear the defendant's application first. At the hearing of the defendant's application, Mr TO Thomas, counsel for the plaintiff, raised a preliminary objection. I agree with Mr TO Thomas that the defendant's application purportedly under O 14 r 1 of the RHC, as the heading seems to indicate, is not supported by the grounds put forth therein. In the circumstances Mr TO Thomas submitted that the O 14 application should not be entertained by me. However, as regards the objection in respect of the O 18 application, though it is not substantially in Form 62 as required by O 32 r 1 of the RHC, I am of the view that the defendant did state the grounds as required by O 18 r 19(1) of the RHC in the application and there is therefore sufficient compliance with the provisions of the RHC. In the circumstances while agreeing with the objection raised by Mr TO Thomas in respect of the O 14 application I would, however, overrule his preliminary objection in respect of the application of the defendant under O 18 r 19(1) of the RHC. In the premises I will proceed to consider only the application under O 18 of the RHC.

Before proceeding to consider the merits of the defendant's application under O 18 of the RHC it would not be inappropriate perhaps to consider first the issue of delay raised by Mr TO Thomas. It is not disputed that the defendant filed the application well after the defence and counterclaim was filed. While it may be true that in an O 14 application, it must *normally* be filed before the defence is delivered, however, in an O 18 application it would appear that there is no such constraint. Order 18 r 19 of the RHC specifically provides 'The Court may *at any stage of the proceedings* order to be struck out or amended any pleading ...' (emphasis added). The issue of delay in an O 18 application was considered by Zakaria Yatim J in *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman and another action*[1] where at p 635 the learned judge said:

A The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice* 1985, Vol 1, p 304.

B I respectfully agree. In the circumstances of the present case the issue of delay raised by Mr TO Thomas is definitely without merit.

As this is an application by the defendant under O 18 r 19 of the RHC, I need therefore to examine the statement of claim and the affidavits (where applicable) filed therein to see whether it discloses a reasonable cause of C action or is scandalous, frivolous or vexatious (not 'rexatious', apparently a typing error) and/or may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court. The notice of intention to use other affidavits by the defendant was issued accordingly in compliance with O 32 r 13(6) of the RHC.

D Essentially, the plaintiff's cause of action is centred on 'adverse possession' of the said land. Therefore the issue of the caveat lodged by the plaintiff, and dealt with by me already, should not be further argued by counsel for both parties as it is irrelevant for the purpose of considering the defendant's summons-in-chambers to strike out the plaintiff's action.

E *Background facts*

The original title of the said land is Parcel 136, Block 10, Kuching Central Land District containing an area of 1.42 acres. Initially, the plaintiff instituted an Originating Summons No KG 94 of 1990 ('the originating summons') in his capacity as an administrator of the estate of Najer Hassan bin F Paylollahan @ Natir Khan bin Foijoleh @ Najer Hassan bin Paylollahan, deceased ('Natir Khan') against the Registrar of Land and Survey Department, Kuching Division, Kuching and Kang Min (f) (the executrix of the estate of Lok Chuan Yew, deceased) as the first and second defendants respectively, seeking:

G (a) the Caveat No L 3033/73 registered on 30 May 1973 against the said land shall not be deemed to have lapsed by virtue of the provisions of s 178 of the Land Code or otherwise;

(b) the rights and titles to the said land have been extinguished by adverse possession on the part of the plaintiff within the provision of s 26 of the H Limitation Ordinance (Cap 49);

(c) the plaintiff is entitled to be registered as the proprietor of the said land.

The circumstances that led to the filing of Caveat No L 3033/73 by Natir Khan and the originating summons by the plaintiff would appear to be more on the basis of the allegation that Lok Chuan Yew (deceased) ('LCY') I became the registered proprietor of the said land in 1968 by fraud rather than adverse possession. The facts in the originating summons would seem to show that Natir Khan entered into a sale agreement on 23 January 1968 (see exh 'D' in the originating summons) with LCY in respect of the said land for a consideration of $38,500 of which $30,000 was acknowledged by

LCY as a debt to Natir Khan. A memorandum of transfer of the said land was duly executed before an advocate, purportedly transferring the said land to LCY and was duly registered in LCY's name. However, Natir Khan continued to be in possession of the said land and on his refusal to give up possession LCY commenced action in the district court at Kuching vide Civil Case No C/CIV/17/73 against Natir Khan in January 1973 claiming, inter alia, vacant possession of the said land. Natir Khan in his amended defence in Civil Case No C/CIV/17/73 alleged fraud and set out the particulars of fraud under para 1 thereof and further claims, inter alia, for a declaration that he is entitled to the said land which forms part of the land described in the agreement of sale and memorandum of transfer dated 23 January 1968 in respect of Parcel 136 executed by themselves, rescission of the said agreement and memorandum of transfer and an order directing the Registrar, Land Registry, Kuching to rectify the register under Part VII of the Land Code to substitute Natir Khan as the registered proprietor of the said land. Subsequently Civil Case No C/CIV/17/73 was discontinued with the consent of counsel for Natir Khan without prejudice to LCY commencing further proceedings in the High Court (see exh 'E' to the originating summons). Though the reason for the discontinuance was not disclosed, apparently it would seem clear to me that by the prayers in the counterclaim of Natir Khan, the counterclaim is beyond the jurisdiction of the district court. As far as I know there has been no action filed in the High Court so far by LCY or his executrix or administrator as intimated by exh 'E'. Be that as it may, the plaintiff in his capacity as administrator of the estate of Natir Khan in instituting the originating summons claimed Caveat No L 3033/73 as an asset of the estate (see exh 'A' to the originating summons). I dismissed the plaintiff's application by way of summons-in-chambers for an order that Caveat No L 3033/73 shall not be deemed to have lapsed by virtue of s 178 of the Land Code until after the disposal of the originating summons and in fact I questioned whether a caveat can be considered as an asset of the estate. The plaintiff, with the consent of counsel for the second defendant, withdrew the originating summons and it was accordingly struck out with costs by me.

Subsequently the plaintiff filed Caveat No L 4671 on 16 April 1990 in respect of the said land claiming adverse possession of upwards of 17 years against the interests of the registered proprietor (LCY) apparently on the ground that the right of the registered proprietor has been extinguished by virtue of s 26 of the Limitation Ordinance (Cap 49) read with item 112 of the schedule to the said Ordinance. On 26 June 1990 the plaintiff filed the present suit in his personal capacity seeking the declarations set out by me earlier. At the same time he filed by way of notice of motion seeking for an order that Caveat No L 4671/90 shall not be deemed to have lapsed under s 178 of the Land Code until after the judgment in this suit. This was as a result of the notice issued by the registrar after an application by the defendant as executrix of the estate of Lok Chuan Yew for transmission in respect of the said land. As indicated earlier on, I dismissed the plaintiff's notice of motion and there has been no appeal against my said order. So much for the background facts.

A The issue for me to consider now is whether the defendant can succeed under O 18 r 19 of the RHC for the plaintiff's writ of summons and statement of claim filed therein to be struck out.

In considering the defendant's application, the court will have to examine and consider whether the claim of the plaintiff is obviously unsustainable. Wan Sulaiman FJ in *Golden Century Development Sdn Bhd & Anor v Ganhoe & Anor*[2] said at p 87:

> We think it will suffice for us to refer to the well-known authority *A–G of Duchy of Lancaster v L & NW Railway Co* [1892] 3 Ch 274 in which it was held that the summary procedure under the English rule which is identical to ours, can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

Though it would appear that the main complaint is fraud, the plaintiff proceeded on adverse possession as a cause of action. It is then pertinent for me to consider whether the doctrine of adverse possession is applicable in the Torrens system by virtue of the Land Code. The doctrine of adverse possession relates to the mode of acquisition of title to land after the statutory period of limitation has elapsed.

Section 131 of the Land Code is the relevant provision on this aspect and it reads:

> No title or right to land included in the Register shall be acquired by possession or user *adversely* to or in derogation of the title of the registered proprietor holding directly from the Government. (Emphasis added.)

In my view, such a provision is based on the notion of indefeasibility of title (see s 132 of the Land Code). Therefore subject to the limitations imposed under s 132 of the Land Code, an indefeasible title under the Land Code has its full force as a title protected against all other *adverse claims*.

Mr Arthur Lee, counsel for the defendant, in submitting that the doctrine of adverse possession is not applicable here relied on the case of *Sparks v Meers & Ors*[3] where the Supreme Court of New South Wales held that it was not possible for the plaintiff to claim adverse possession against the registered proprietor of land when considering s 45 of the Real Property Act 1900 of New South Wales which reads:

> No title to land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of such statute.

Mr Arthur Lee contended that s 45 of the Real Property Act 1900 of New South Wales is similar to our s 131 of the Land Code. That may be so except that the statute of limitation is not mentioned in our s 131 of the Land Code. Under the corresponding provision in the National Land Code 1965 (applicable to Peninsular Malaysia only), ie s 341, the statute of limitation is mentioned therein.

Mr Thomas, counsel for the plaintiff, submitted that the plaintiff is relying on the statute of limitation to back his claim of adverse possession.

In that event, what then is the effect of the absence of mention of the statute of limitation in s 131 of the Land Code? A

The exclusion of the application of the doctrine of adverse possession in the Torrens system is based on the notion that such doctrine would conflict with the fundamental principle of the Torrens system — the indefeasible register. The basic object of the Torrens system, it would appear, is to facilitate proof of ownership by certifying title in a written instrument and therefore this principle of allowing ownership to be proved by evidence of physical occupation should be rejected (see the article on 'The doctrine of adverse possession and the Torrens system' by Lee Min Sen in [1961] MLJ at p xxvi). Adverse possession was once another express exception to indefeasibility of title under the early registration of titles legislation in the Federated Malay States prior to the former Land Code (Cap 138). The former Land Code (Cap 138), however, altered the law with the introduction of s 43. The corresponding provision in the National Land Code 1965 is s 341. According to David SY Wong in *Tenure and Land Dealings in the Malay States* at p 379: B C D

> It may be observed that the reason for making adverse possession an exception to the indefeasibility of title in the early legislation was presumably related to the state of land administration at that period when a system of registration of land holdings was being gradually established and the policy was to favour the recognition of claims by persons who had long been in actual possession of the land. E

In Sarawak the previous Land Code (Cap 27) in giving effect to the indefeasible title did not recognize the squatters' right to acquire a title to land by physical possession. This is provided under s 30(1) of the Land Code (Cap 27) which reads:

> No one whether a native or otherwise may, without documentary title, acquire a title to land by squatting on it or on any part thereof or exercising acts of ownership over it, and anyone so doing may be required to vacate the land without payment of any compensation, even though he may have squatted on the land or exercised acts of ownership over it for twelve years and upwards. F

Thus the Sarawak land legislation, it would seem, did not clearly provide adverse possession as an exception to indefeasibility of title. I agree with the view expressed by the learned authors in *Land Law in Malaysia* (Butterworths) at p 7 that s 131 of the Land Code is in the same position as s 341 of the National Land Code 1965 in that there can be no adverse possession against the registered proprietor of land or any person entitled to a registered interest therein for any period whatsoever. G H

It would appear at most that it will still be possible to acquire *a possessory title against an unregistered interest.* Therefore mere possession of the land does not in my view, confer a registered title on the squatter but he merely acquires a common law title and the statute of limitation would be applicable in such a situation. In *Sparks v Meers*,[3] the Supreme Court at p 13 said: I

> Moreover, s 45 does not simply provide that the Real Property Limitation Act shall not apply to any land, or to any estate, the title to which is under the provisions of the Real Property Act; it simply purports to protect the title of the registered proprietor and does not appear to be directed to the rights of persons who are not concerned with the title of the registered proprietor.

Further on, the Supreme Court of New South Wales said: 'However what s 45 does do is to prevent the extinction of the title of the registered proprietor by any adverse possession.'

The Supreme Court of New South Wales further on the same page said:

> In a Queensland decision, *Miscamble v Phillips* [1936] QSR 136, the Full Court of the Queensland Supreme Court held that a title could not be obtained to Torrens land in Queensland by virtue of any adverse possession, *despite the absence of any equivalent in the Real Property Act of 1861 (Q) of the New South Wales s 45*. This view was arrived at on the ground that the Queensland equivalent of s 40 provided that the certificate of title should be conclusive evidence that the person named therein is seised or possessed of the land for the estate or interest therein specified. (Emphasis added.)

Our s 131 protects the 'title' or 'the right' of the registered proprietor; it prevents both the acquisition of a title by adverse possession or user to or in derogation of the title of the registered proprietor holding directly from the government. The situation here appears to be stronger as compared to Queensland where there is no equivalent provision of s 45 of the New South Wales Real Property Act (similar to our s 131 of the Land Code). Mr TO Thomas further argued that the title in the said land is not held directly from the government. I think, such an argument is a fallacy as title of land is, in my view, held directly from the government as is evidenced from the definition of 'document of title' in s 2 of the Land Code which reads:

> 'document of title' means a grant, lease of State land, occupation ticket or other document evidencing title to land whenever issued, but does not include a licence, permit or caveat.

Therefore one does not hold a title of land from any other person other than the government and to construe otherwise would lead to absurdity as alienation of land is by the government.

Therefore, in my view, the absence of mention of the statute of limitation in s 131 of the Land Code makes no difference as to the protection of the indefeasible title of the registered proprietor in the Torrens system. It would appear that the Torrens statutes do not in any way affect the case of an adverse possession of unregistered land. However, he must make an application to have the land brought under the provisions of the Torrens system in the same way as any other owner of unregistered land.

Even assuming that the statute of limitation is applicable here as contended by Mr TO Thomas, the plaintiff must register his interest once the statutory period has elapsed or he is liable to be ousted. This is in conformity with the Torrens system and the indefeasible title notion. There is no evidence of the registration of his interest in this case. In any event, an examination of the land legislation of Sarawak would seem to show that there is no provision for an application of a possessory title to have the land brought under the provision of the Torrens statutes. It further confirms my view that the claim of adverse possession against a registered proprietor and thereby the statute of limitation are not applicable in Sarawak. It would appear therefore that the statute of limitation is applicable only in respect of the acquisition of possessory title against an unregistered interest.

If the construction of the law is clear, as is my view in this case, it is not a matter of discretion for the court to exercise its powers. It is not right to

call upon the defendant to justify a plea which discloses no cause of action. In the circumstances on this ground alone this action should be struck out as it discloses no cause of action and is prejudicial and embarrassing (see *Willoughby v Eckstein*[4]). A

If I am wrong in my construction of the law I then need to examine the pleadings and the affidavit evidence to see whether there is a cause of action disclosed on adverse possession. It is agreed that it is not necessary for the plaintiff to prove affirmatively physical possession of every bit of land. It is enough if the acts of possession show that the plaintiff had enjoyed such dominion over the property in the manner in which such dominion is normally exercised, so as to acquire title (see BB Mitra *Limitation Act* (17th Ed) at p 331). From the affidavit in opposition of Lok Haw Joo (encl 9) filed on behalf of the defendant, it would seem to show that the plaintiff was not staying on the land and did not enjoy such dominion over the land in question. There has been no affidavit filed by the plaintiff denying such facts. It is true that the plaintiff is not bound to file any affidavit in reply (see *Shanghai Hall Ltd v Town House Hotel Ltd*[5]) but in the absence of a denial or explanation of such material facts, in my view, such facts are deemed admitted as correct. There do not seem to be evidence shown by the plaintiff in the pleadings that he is either in physical possession of the land or exercising dominion over the property. In the circumstances he failed to show evidence of adverse possession and O 18 r 19 of the RHC can rightly be invoked. B C D E

Further, the court is entitled to look at the history of this case to determine whether the pleadings disclose a cause of action. This is what Lord Parker CJ said in *Re Vernazza*[6] at p 202:

> In considering whether any proceedings are vexatious one is entitled to and must look at the whole history of the matter and it is not determined by whether the pleading discloses a form of action. Indeed that is the principle applied under the rules of court when application is made to strike out a pleading. Though the pleading may be in order, the court in its inherent jurisdiction is entitled to look at affidavits as to the history of the matter, and if in the light of the history the action is vexatious, the matter can be struck out and the action dismissed. F

In the originating summons, the plaintiff, in his capacity as administrator, relied on similar grounds as the present case but for reasons best known to himself decided to withdraw the originating summons. From the history of the case as set out earlier by me and the facts as disclosed in the lengthy statement of claim the real cause for complaint would appear to be the alleged fraud rather than adverse possession by a squatter and it is patently clear to my mind that the action filed herein on the ground of adverse possession is an abuse of the process of the court and can be said to be vexatious. G H

In the circumstances I would allow the application of the defendant and accordingly I dismiss the action with costs. I

Defendant's application allowed; plaintiff's action dismissed.

Reported by PS Ranjan